

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MAXIMILLIAN SALAZAR III, )  
 ) NO. CV-12-0186-LRS  
Plaintiff, )  
 ) **ORDER RE PLAINTIFF'S MOTION**  
-vs- ) **FOR PARTIAL RECONSIDERATION**  
MONACO ENTERPRISES, INC., ) **OF COURT'S RULING ON**  
GENE MONACO, and ROGER ) **DEFENDANTS' MOTIONS IN**  
BARNO, ) **LIMINE**  
Defendants. )  
)

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**BEFORE THE COURT**, and now under advisement, is Plaintiff's  
[Motion for] Partial Reconsideration of Court's Order on  
Defendants' Motions in Limine, ECF No. 370, filed on February  
25, 2015.

Plaintiff Maximillian Salazar III requests reconsideration  
based on "clear error" of the following rulings regarding  
Defendant Monaco Enterprises, Inc. ("MEI"), Defendant Gene  
Monaco, and Defendant Roger Barno's (collectively  
"Defendants") Motions in Limine (ECF No. 269) made at the

1 February 19, 2015 Motion Hearing: 5, 16, 48, 53, 65, 72, 83,  
2 and 98. Plaintiff also requests reconsideration of the  
3 following rulings made with regard to Defendants' Exhibits:  
4 101 and 102. The Court will address Plaintiff's requests for  
5 reconsideration of these matters below.

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7 A motion for reconsideration can only be granted when a  
8 district court: (1) is presented with newly discovered  
9 evidence; or (2) committed clear error or the initial decision  
10 was manifestly unjust; or (3) there has been an intervening  
11 change in controlling law. *Dixon v. Wallowa County*, 336 F.3d  
12 1013, 1022 (9th Cir. 2003).  
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15 **A. Motions In Limine ("MIL")**

- 16 1. **MIL 5:** Any reference or evidence to other proceedings  
17 or investigations whether filed or unfiled.  
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19 The Court granted MIL 5 at the motions hearing. Plaintiff  
20 argues that the best evidence that Salazar believes MEI was  
21 committing fraud is his later report of that fraud to the U.S.  
22 Government. Plaintiff argues as the relator in a Qui Tam  
23 proceeding, he should be able to testify to the fact that the  
24 U.S. Government initiated said Qui Tam proceeding. Plaintiff  
25 asserts that it is clear in the Ninth Circuit that  
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1 consolidated Qui Tam and retaliation cases allow such evidence  
2 to be considered.

3 Defendants argue that the status or pursuit of other  
4 proceedings against MEI are irrelevant to this litigation.  
5 Defendants further argue that anything Plaintiff did after he  
6 was terminated is not relevant.

7 The Court will deny Plaintiff's request to reconsider MIL  
8 based on the reasons expounded in the Orders Denying  
9 Consolidation of Cases (ECF Nos. 274, 311).

10 2. **MIL 16:** Any and all reference to or evidence of  
11 gross or net profits, profitability or lack thereof  
12 of MEI.

13 The Court reserved its ruling on MIL 16. Plaintiff  
14 requests the Court to deny MIL 16 based on the possible need  
15 to impeach individual defendant(s). The Court refrains from  
16 reconsidering its prior ruling in recognition of needing  
17 contextual information in order to rule on this motion.

18 3. **MIL 48:** Any and all statements by any witness  
19 expressing a personal opinion that MEI 'over  
20 charging,' 'over billing' or 'gouging' the government  
21 or other customers.

22 The Court granted MIL 48. Plaintiff argues the testimony  
23 of others that shared Mr. Salazar's concern is the best

1 evidence that a "reasonable employee in the same or similar  
2 circumstances" would have believed MEI might be committing  
3 fraud, the objective belief element of his FCA retaliation  
4 claim.

5 Defendants assert that the Court has already stated that  
6 it will allow Plaintiff to make an offer of proof for this  
7 type of testimony if Plaintiff can show that any such  
8 termination of another MEI employee was sufficiently similar  
9 to Salazar's.

10 In light of the Court's reconsideration of the  
11 relationship<sup>1</sup> between Title VII's anti-retaliation provision  
12 and the FCA whistleblower statute, the Court will reconsider  
13 its earlier ruling and reserve ruling on MIL 48 for the  
14 purpose of enabling admissible evidence of the objective  
15 belief element of Plaintiff's FCA retaliation claim to be  
16 received. In particular, evidence that a "reasonable employee  
17 in the same or similar circumstances" would have believed MEI  
18 was allegedly committing fraud may, if otherwise admissible,  
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<sup>1</sup>In adopting the [reasonable belief] standard, the *Moore* court drew upon its interpretation of Title VII's anti-retaliation provision. See *Moore v. Cal. Inst. of Tech. Jet Propulsion Lab.*, 275 F.3d 838, 845 n. 1 (9th Cir.2002) (citing *Trent v. Valley Elec. Ass'n*, 41 F.3d 524, 526 (9th Cir.1994)).

1 be heard. Free floating hearsay will not qualify for  
2 admissibility.

3       4. **MIL 53:** Any reference to MEI employee attrition,  
4 termination, layoffs, or firings including Scott  
5 Barrick, Brenda Osborne or Jake Osborne, or any  
6 employee other than Mr. Salazar.

7       Plaintiff asserts that MIL 53 is overly broad and although  
8 the Court granted the motion, it remarked that Plaintiff could  
9 make an offer of proof at the appropriate time for the  
10 admission of such evidence. Plaintiff argues this ruling was  
11 in error because such evidence is relevant and admissible to  
12 provide circumstantial evidence of the employment environment  
13 at MEI during this time period and to help explain the  
14 pretextual basis for Plaintiff's termination.

15       Defendants argue that if Plaintiff had evidence that the  
16 departures of Mr. Barrick, Ms. Osborne or Mr. Osborne  
17 correlated to Plaintiff's termination, he certainly would have  
18 pointed that information out to the Court. But they have  
19 failed to do so.

20       The Court will reconsider its earlier ruling and **RESERVE**  
21 on MIL 53, recognizing that it may be appropriate to develop  
22       ///

1 the evidence of pretext and retaliation through circumstantial  
2 evidence.

3       5. **MIL 65:** Any and all reference to or evidence that any  
4 employee brought any concerns to MEI management's  
5 attention of alleged waste, fraud or abuse in the  
6 absence of a showing, outside the presence of the  
7 jury, that said employee was thereafter terminated by  
MEI.

8              The Plaintiff has not shown that the Court's ruling is  
9 clearly in error. However, in an abundance of caution and in  
10 light of all the factors impacting trial, the Court will  
11 reserve.

12       6. **MIL 72:** Any reference to insurance coverage and/or  
13 settlement negotiations.

14              The Court will not reconsider its earlier ruling.

15       7. **MIL 83:** Precluding/preventing plaintiff from  
16 questioning witnesses out of court statements made by  
17 various witnesses in the case to elicit whether the  
18 witness agrees or disagrees with the opinions,  
19 conclusions, surmise and conjecture contained therein.

20              The Court will reserve until the content is before the  
21 Court.

22       8. **MIL 98:** Evidence or testimony relating to  
23 alleged complaints about MEI's compliance or lack of  
24 compliance with wage and hour laws, made by Jake  
Osborne, Jason Voss or other employees

1 Plaintiff argues that this information, like over-billing  
2 for travel expenses, is relevant to the alleged fraudulent  
3 activity at or about the time of Salazar's termination.  
4

5 Defendants assert that complaints made by other employees  
6 regarding unrelated issues have nothing to do with Salazar's  
7 claims. Defendants note that Plaintiff has never complained  
8 about wage and hour laws in his case.  
9

10 The Court earlier reserved on this issue until a nexus is  
11 shown between the complaints and retaliation of an employee  
12 making such complaints. Therefore, the earlier ruling will not  
13 be changed.  
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16 **B.** **Exhibits 101** (2011 Employee Handbook) and **Exhibit 102**  
17 (Acknowledgment of At-Will employment Status signed by  
Plaintiff, dated 6/7/2011)

18 Plaintiff argues that in light of what he perceives as  
19 the Court's "restraints in other areas surrounding  
20 Plaintiff's case," it would be error to admit evidence or  
21 argument of Mr. Salazar's at-will employment status through  
22 the Employee Handbook. Plaintiff, in conjunction with this  
23 motion, withdraws his own Exhibit 1, the 2011 employment  
24 manual.  
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1 Defendants oppose such motion explaining that if the  
2 Plaintiff cannot prove that his termination was retaliatory,  
3 the jury has a right to know that MEI was at liberty to  
4 terminate him.

5 The Court stands by its earlier ruling admitting Exhibits  
6 101 and 102 recognizing that a jury instruction will likely be  
7 needed to explain the tension inherent in the components of an  
8 FCA claim and at-will employment.

9 Accordingly,

10 **IT IS HEREBY ORDERED** that: Plaintiff's [Motion for]  
11 Partial Reconsideration of Court's Order on Defendants'  
12 Motions in Limine, **ECF No. 370**, **GRANTED** in part and **DENIED** in  
13 part.

14 **IT IS SO ORDERED.** The District Court Executive is  
15 directed to enter this Order.

16 **DATED** this 5th day of June, 2015.

17 *s/Lonny R. Sukko*

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18 LONNY R. SUKCO  
19 SENIOR UNITED STATES DISTRICT JUDGE